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NO. A-264 -

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IN THE SUPREME COURT OF THE UNITED
October Term, 1982

STATES
ALEXANDER L. STEVAS,
CLERK

JANICE M. HAYES,
Petitioner,

vs.

VALLEY BANK OF NEVADA, a Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN C. WHELTON, individually and as agents or officers of VALLEY BANK; WESTERN STATES BANKCARD ASSOCIATION, a California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE: TRW, INC., an Ohio corporation d/b/a/ TRW CREDIT DATA, aka TRW INFORMATION SERVICES: STATE OF NEVADA: JOHN C. MOWBRAY, ELMER GUNDERSON, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their capacities as Justices of the Nevada Supreme Court,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner

(Petitioner has not been an attorney for a sufficient length of time to be admitted to the Bar of this Court.)

QUESTIONS PRESENTED

The central questions presented herein pertain to the constitutionality and validity of Nevada Rule of Appellate Procedure 46(b), which prior to its 1981 amendment, prohibited litigation in proper person before the Nevada Supreme Court.

1. Whether the Nevada Supreme Court may constitutionally deprive pro se civil litigants of their right to an appellate review for the sole reason that they have not obtained an attorney?

2. Whether NRAP 46(b) is violative of the provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution and the provisions of the Sherman Anti-Trust Act when applied to cause dismissal of civil appeals of right?

3. Whether the federal district court

should assume jurisdiction of petitioner's claims as petitioner has no feasible state forum available and would be prejudiced as either appellant or respondent before the Nevada Supreme Court?

4. Whether the Nevada Supreme Court's refusal to review pro se civil appeals can operate to let a state trial court judgment stand and create a res judicata bar?

5. Based on the fact that petitioner timely filed her counterclaims in the state court action, should her claims in federal court relate back to the date of the state court filing?

6. Whether the district court clearly erred in dismissing on a res judicata theory and whether the Court of Appeals so far departed from the accepted course of judicial proceedings as to call for this Court's power of supervision in that the Court independently

raised and erroneously decided issues of fact not raised or addressed by the district court, provided the appellees with a defense which they had not asserted, and decided an issue in conflict with the decisions of this Court in this same case.

The other questions presented did not pertain to NRAP 46(b) and were not decided or addressed by either the district court or Court of Appeals:

7. Whether the imposition of "late" charges" on a Master Charge credit card account, which charges were not disclosed to petitioner, represent an impermissible liquidated damages clause and a violation of state and federal statutes against usury?

8. Whether a credit reporting agency, such as TRW, INC, must disclose the sources on which it based and published its false credit reports and whether it is liable for its failure to investigate and correct false reports?

INDEX

Questions Presented	1
Table Of Contents	i
Table of Authorities	iii
Opinion Below	4
Prior Judgments Of This Court	4
Constitutional Provisions, Statutes, Regulations And State Statutes Involved	9
Statement Of The Case	11
Reasons For Granting The Writ	19
1. This Court Has Previously Indicated That The Issue Presents A Substantial Federal Question	20
2. The Issue Of NRAP 46(b)'s Constitutionality Will Burden The Federal Courts Until It Is Resolved By This Court. The Question Should Be Decided By This Court.	24

3.	The Court of Appeals And The District Court Clearly Departed From The Accepted Course of Judicial Proceedings	28
4.	Both Lower Courts Disregarded The Determinations Of This Court And The Court Of Appeals Made Findings Of Fact In Conflict With The Judgments Of This Court	34
	Conclusion	36
	Appendix	1a

TABLE OF AUTHORITIES

Cases

<i>Boddie v. Connecticut</i> , 378 U.S. 146, 84 S. Ct. 1734	26,27
<i>Bounds v. Smith</i> , 430 U.S. 817, 97 S.Ct. 1491 (1977)	25
<i>Gaglio v. Ulikanni</i> , 507 F. 2d 721, (9th Cir. 1974)	25
<i>Gilmore v. Lynch</i> , 319 F. Supp. 105, (N.D. Cal. 1970), aff'd 404 U.S. 15, 92 S.Ct. 250	26
<i>Elva Haugen v. Bryan</i> , 430 U.S. 909, reh den. 430 U.S. 976	22
<i>Elva Haugen v. Taylor</i> , 431 U.S. 942 ..	22
<i>Hayes v. Board of Trustees of the Clark County School District</i> , 444 U.S. 1009, 100 S.Ct. 658, 444 U.S. 1061, 100 S. Ct. 994, reh. den. 448 U.S. 908, 100 S.Ct. 3052	6,7
<i>Hayes v. Honorable Justices of the Nevada Supreme Court</i> , Case No. 80-5311, United States Court of Appeals for the Ninth Circuit; Case No. A-299, U.S. Supreme Court, petition for writ of certiorari to be filed November 15, 1982	9,24

<i>Hayes v. Valley Bank of Nevada;</i> <i>Hayes v. Gladstone and Iverson,</i> 446 U.S. 902, 64 L.Ed. 254, 100 S.Ct. 1826, rehearing denied, 448 U.S. 908, 100 S.Ct. 3052, 5,6,7,19,34	
<i>Markoff v. American Heritage</i> <i>Life Insurance Co.,</i> 100 S.Ct. 725	23,30
<i>Mendez v. Heller,</i> 420 U.S. 916, 95 S.Ct. 1107	25
<i>Mirin v. Justices of the Supreme</i> <i>Court of Nevada,</i> 415 F. Supp. 1178 (Nev. 1976)	18
<i>O'Connor v. Palludan Corp.,</i> 449 U.S. 944, 101 S.Ct. 343, rehearing denied, 449 U.S. 1104, 101 S.Ct. 905.	22,23
<i>O'Connor v. State of Nevada, et al.,</i> Petition for Writ of Certiorari U.S. Supreme Court, pending ..	24
<i>Ontwein v. Schwal,</i> 410 U.S. 656	27
<i>Roberts v. LaVallee,</i> 389 U.S. 40, 19 L. Ed. 41, 88 S.Ct. 194	25
<i>Smith v. Bennett,</i> 365 U.S. 708	26
<i>United States v. Kras,</i> 409 U.S. 434, 93 S.Ct. (1973)	27

STATUTES AND REGULATIONS

UNITED STATES CONSTITUTION

First Amendment	1
Fifth Amendment	5,10
Fourteenth Amendment	1

UNITED STATES STATUTES

1 15 U.S.C. Sec.1	1,19
15 U.S.C. Sections 1601-1693, 1601, 1640, 1680, 1681, 1691	9,12,32
28 U.S.C. 1254(1)	8
28 U.S.C. 1257(2)	5,8,19,21
28 U.S.C. 1291	31
28 U.S.C. 1331	11
28 U.S.C. 1332	11
28 U.S.C. 2101(e)	8
28 U.S.C. 2201, 2202	12
28 U.S.C. 2283	12
42 Y,S,C, Sec. 1983	9

RULES OF THE UNITED STATES
SUPREME COURT

Rule 17	19
---------------	----

NEVADA CONSTITUTION

Article 6, Sections 2 and 4	27
-----------------------------------	----

NEVADA RULES OF APPELLATE PROCEDURE

Rule 3A(b)	25
Rules 30 and 32	15
Rule 46(b) ...1,3,6,9,10,11,12,15, 16, 19	
21,23,24,25,29,32,34,35	

NEVADA SUPREME COURT RULES

Rule 44	9,10
---------------	------

NO. A-264

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JANICE M. HAYES
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VALLEY BANK OF NEVADA, a Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN WHELTON, individually and as agents or officers of VALLEY BANK: WESTERN STATES BANKCARD ASSOCIATION, a California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE; TRW, INC., an Ohio corporation d/b/a/ TRW CREDIT DATA, aka TRW INFORMATION SERVICES; STATE OF NEVADA; ELMER GUNDERSON, JOHN MOWBRAY, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their official capacities as Justices of the Supreme Court of Nevada,

RESPONDENTS.

*On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For
The Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

The petitioner Janice Hayes respectfully prays that a writ of certiorari issue to review the Memorandum Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 21, 1982.

OPINIONS BELOW

The judgments of the United States Court of Appeals and of the United States District Court for the District of Nevada were not reported. The district court granted defendants' motions to dismiss and dismissed the Complaint with prejudice for want of jurisdiction. Case No. CV-LV-79-182, HEC, on May 18, 1981, and denied rehearing. The orders of the district court appear in the appendix hereto at p. 3a, *infra*, and p. 4a, *infra*, and of that of the Court of Appeals at p. 1a, *infra*.

THE JUDGMENTS OF THIS COURT

The instant case has previously been

before this Honorable Court on appeal from the Supreme Court of Nevada, taken pursuant to Section 1257(2) of Title the United States Code.

Hayes combined two factually unrelated cases from the Supreme Court of Nevada, Case No. 11631, *Valley Bank of Nevada v. Janice Hayes, sub nom. Hayes v. Valley Bank of Nevada*, and Case No. 11992, *Hayes v. Scotty Gladstone*, into one Jurisdictional Statement, which was docketed as Case No. 79-6152, *Hayes v. Valley Bank of Nevada; Hayes v. Scotty Gladstone and Mervin Iverson*.

This court dismissed for want of a properly presented federal question, 446 U.S. 902, 64 L.Ed. 254, 100 S.Ct. 1826, rehearing denied, 448 U.S. 908, 100 S.Ct. 3052. (June 30, 1980).

Hayes also took an appeal pursuant to 28 U.S.C. 1257(2) from orders of the Nevada Supreme Court in another case in

in which the constitutionality of Nevada Rule of Appellate Procedure 46(b) was the only federal question presented, Case No. 79-5777 in this Court, *Janice Hayes v. the Board of Trustees of the Clark County School District*.

This Court dismissed Case 79-5777 for want of jurisdiction and treating the appeal papers as a petition for certiorari, denied certiorari. 444 U.S. 1009, 100 S. Ct. 658 (application for extension of time to docket appeal denied); 444 U.S. 1061, 100 S.Ct. 994, (1980), rehearing denied, 448 U.S. 908, 100 S.Ct. 3052. (1980).

Hayes filed a Petition for Consecutive Rehearing in Case No. 79-5777, which was file-stamped as received by the Clerk of this Court on May 12, 1980, but which was returned to Hayes without presentation to the Court. Hayes's motions to add the Nevada Supreme Court and the State of

Nevada as appellees as real parties in interest, to recall and stay the judgment in Case No. 79-5777 (School District), to consolidate Case No. 79-5777 and No. 79-6152 (Valley Bank; Gladstone) for hearing and to stay the mandate in No. 79-6152 were also file-stamped received by the Clerk and returned to Hayes without being submitted to this Court for its consideration.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 21, 1982, p. 1a, *infra*. A petition for rehearing and motion for leave to file a late petition for rehearing, filed on July 13, 1982, have never been ruled on. A Motion To Recall The Mandate, filed July 15, 1982, was denied.

On September 13, 1982, Mr. Justice Rehnquist granted an extension of time until October 18, 1982 to file a Petition

for Writ of Certiorari. This Petition is timely filed within the extension of time granted.

The jurisdiction of this Court rests on 28 U.S.C. §1254(1). Neither the Court of Appeals nor the district court decided the federal questions presented. If this Honorable Court is not disposed to assume jurisdiction under 28 U.S.C. 1254(1), Hayes respectfully points out to the Court that jurisdiction could be found under 28 U.S.C. §1257(2), as her motions and petition for rehearing in her parallel cases taken pursuant to said statute are presumably still pending before this Court. See discussion under "JUDGMENTS OF THIS COURT," page 7 of this petition, *supra*.

Hayes also respectfully suggests that this Court could assume jurisdiction under 28 U.S.C. 2101(e), if it should find that the order of the district court

was not a final appealable order.

Hayes asks the Court to note that on November 15, 1982, she will file a Petition for Writ of Certiorari in Case No. A-299 in this Court, *Hayes v. the Honorable Justices of the Nevada Supreme Court*, which encompasses the within case.

CONSTITUTIONAL PROVISIONS,
STATUTES, REGULATIONS AND
STATE STATUTES INVOLVED

The constitutional provisions, statutes, regulations and procedural rules which are relevant to the determination of this case are as follows: the First, Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, 15 U.S.C. §§ 1601-1693, 15 U.S.C. §§ 1640 and 1681, Sherman Anti-Trust Act, § 1, 15 U.S.C. § 1, Nevada Supreme Court Rule 44 (SCR 44) and Nevada Rule of Appellate Procedure 46(b). ("NRAP 46(b)").

Fifth Amendment to the Constitution of the United States:

(N)or shall any person be deprived of life, liberty, or property without due process of law. .

Nevada Rule of Appellate Procedure 46(b), prior to its amendment in October, 1981, provided that:

No party, except a habeas corpus petitioner, may appear in proper person before the Supreme Court.

(Nevada) Supreme Court Rule 44 provides:

Nothing in these rules shall be so construed as to prevent any person from appearing in his own behalf in any court in this state except the supreme court.

STATEMENT OF THE CASE

This action began in a state court of Nevada when Valley Bank of Nevada, (Valley Bank), respondent herein, brought suit against Janice Hayes ("Hayes"), the petitioner herein, and the case would have concluded in the state courts but for the implementation of NRAP 46(b).

This case contains two parts: (1) Hayes's claims against all respondents herein except the Justices of the Nevada Supreme Court for abuse of process, libel, breach of contractual agreements, malicious prosecution, interference with business relationships, denial of credit and for violations of the Fair Credit Reporting Act, Equal Credit Opportunity Act, Truth in Lending Act and the usury laws of the federal government and the State of Nevada.

Jurisdiction was predicated on 28 U.S.C. §1331, 28 U.S.C. §1332, 15 U.S.C.

1681, 42 U.S.C. 1983, the fact that Hayes had no feasible state forum, and the concepts of pendent and ancillary jurisdiction.

Jurisdiction was invoked as to the Justices of the Nevada Supreme Court ("Justices") pursuant to 42 U.S.C. 1983, 42 U.S.C. §1343, 28 U.S.C. §1331, 28 U.S.C. §2201 and 2202 and 28 U.S.C. §2283.

The major federal questions presented pertain to Nevada Rule of Appellate Procedure 46(b): whether the Nevada Supreme Court's refusal to review civil appeals of right brought in proper person can operate so as to let a lower court judgment stand; whether the federal court should provide a forum when a litigant has no feasible state forum and whether the doctrine of relation back should apply to claims timely asserted in state court.

The relevant facts in this action

are as follows:

(1) Hayes was a holder of a Master Charge credit card issued by Valley Bank. Per agreement, Hayes made specified payments to Valley Bank each month based on the current revolving charge balance and Valley Bank Master Charge agreed to accept said payments each month instead of payment in full.

(2) In March, 1977, Valley Bank brought suit against Hayes, falsely alleging that her payments were two months past due. Hayes filed an Answer in proper person with an intended counterclaim not denominated as such.

(3) Prior to leaving to start law school in 1977, Hayes took out the money she had in the state teachers retirement fund and paid creditors, Valley Bank among them. Hayes paid only the undisputed sum due and refused to pay the attorney's fees

and costs of suit sought by Valley Bank.

(4) No papers other than the Complaint and Answer were filed. After more than a year had elapsed, the state court, sua sponte, noticed a "status check" hearing that Valley Bank show cause why its Complaint should not be dismissed for want of prosecution. About a week prior to said hearing, Valley Bank, without Hayes's knowledge or consent, submitted a paper styled "Consent to Dismissal With Prejudice," and a Proposed Order dismissing its Complaint with prejudice, and then obtained the state judge's signature in chambers. Valley Bank's "Consent" paper is appended hereto at p. 17a, *infra*, and the ex parte Order entered the same day, June 8, 1978, is at p. 18a, *infra*.

(5) Hayes moved for a trial of her counterclaims and for leave to supplement her Answer and intended counterclaim with

causee of action which had accrued in the year since the Answer was filed, which motions were denied by the state court. There was no trial of any of Hayes's claims and no dismissal, therefore, of her later-accruing claims. The final order is at p. 13a, *infra*.

(6) Hayes filed an appeal in proper person to the Nevada Supreme Court, which is the only appellate court above the trial courts. All civil appeals are of right. The Clerk advised Hayes by letter of the provisions of Nevada Rule of Appellate Procedure 46(b), prohibiting any appearance in proper person. Hayes filed a motion for leave to appear in proper person and motions to waive NRAP 30 and 32 relating to preparation of an appendix, none of which motions was ever ruled on.

(7) Valley Bank did not file any motion to dismiss. Without notifying Hayes

that her appeal was subject to dismissal unless she obtained an attorney or setting a date when the Opening Brief was due, the Court, sua sponte, dismissed the appeal because Hayes had not filed the Opening Brief, notwithstanding that she had not been given leave to do so, see p. 12a, *infra*, and later denied rehearing, p. 11a, *infra*.

(8) After the Nevada Supreme Court dismissed the appeal, Hayes filed the instant action in federal court to avoid a statute of limitations bar, CV-LV-79-182, HEC. Hayes added defendants and other causes of actions that had accrued since the state trial court's Order in 1978. Hayes had, on July 11, 1979, also filed a separate action for declaratory relief against the Nevada Supreme Court to enjoin it from enforcing N.R.A.P. 46(b). The Nevada Supreme Court had already dismissed all of Hayes's appeals before the

federal district court granted the Nevada Supreme Court's motion to dismiss, without opinion or giving a reason therefor. No. CV-LV-79-142, RDF, Hayes v. Justices of the Nevada Supreme Court, Case No. 80-5311 in the Court of Appeals. (Hayes's Petition for Certiorari is due on November 15, 1982 in this above action).

(9) In the instant action, (Valley Bank), the Justices refused to answer interrogatories and filed motions for a protective order and for a stay of discovery. The district court dismissed the Complaint without ruling on discovery motions, saying that all of Hayes's claims were barred by the doctrine of res judicata. See p. 4a, *infra*, and denied rehearing without opinion, p. 3a, *infra*.

The district court did not address any of the federal questions presented.

(10) The Court of Appeals affirmed.

The Court of Appeals erred in independently raising and deciding issue of fact which had not been raised or litigated in the district court and which were not addressed in the district court's order. The Court of Appeals gratuitously provided the appellee Justices with a defense which they had not asserted and could not assert.

As Hayes has set forth beginning on page 4 herein, Hayes has previously taken an appeal to this court from the same orders of the Nevada Supreme Court which are at issue herein. This action was pending simultaneously in this Court and in the Court of Appeals with the knowledge of both courts.

After Hayes had filed the instant case in district court, the Justices contended that *Mirin v. Justices of the Nevada Supreme Court*, 415 F. Supp. Supp. 1178 (Nev. 1976) held that only the United States Supreme

has jurisdiction to decide the issue of the constitutionality of Nevada Rule of Appellate Procedure 46(b). Hayes, therefore, took an appeal to this Court, pursuant to 28 U.S.C. Sec. 1257(2), Case No. 79-6152, *Hayes v. Valley Bank; Hayes v. Scotty Gladstone and Marvin Iverson, supra*. Said appeal was filed in this Court before the district court ruled.

REASONS WHY THE WRIT OF CERTIORARI
SHOULD BE GRANTED IN THIS CASE

This petition presents several of the reasons delineated in Rule 17 of the Rules of the Supreme Court as bases for consideration of a review on writ of certiorari.

1. This Court has already indicated that the issue presents a substantial federal question. This Court has never dismissed a case concerning Nevada Rule of Appellate Procedure 46(b) for want of a substantial federal question.

2. There is an important question of federal law which should be settled by this Court. The District Court for the District of Nevada and the Court of Appeals for the Ninth Circuit have consistently failed to rule on the issue and the Supreme Court of Nevada will not decide the question.

3. The Court of Appeals so far departed from the accepted course of judicial proceedings and exceeded its scope of review as to call for an exercise of this Court's power of supervision, and additionally permitted the district court to depart from the accepted course of judicial proceedings.

4. Both the district court and the court of appeals disregarded the prior determinations of this court, and decided the case and impliedly the federal question in a way in conflict with applicable decisions of this Court.

5. The issue of NRAP 46(b) can not be adequately presented in an appeal taken pursuant to 28 U.S.C. Sec. 1257(2) as an appellant can not bring the real parties in interest, the Nevada Supreme Court, before this Court. Hayes attempted to join the Nevada Supreme Court as appellees in *Hayes v. Valley Bank, supra*, 446 U.S. 902, but was advised by the Clerk of this Court that additional parties could not be joined in this Court by motion or otherwise.

THIS COURT HAD INDICATED THAT THE
ISSUE OF THE CONSTITUTIONALITY OF
NRAP 46(b) PRESENTS A SUBSTANTIAL
FEDERAL QUESTION

The issue of the constitutionality of Nevada Rule of Appellate Procedure 46(b) and Nevada Supreme Court Rule 44 is a perennial one before this Court.

This Court has never dismissed a case presenting this issue for want of a substantial federal question.

The Court dismissed the instant case, *Hayes v. Valley Bank, supra*, for want of a properly presented federal question. This Court dismissed the companion appeal brought by the same appellant, petitioner herein, *Hayes v. Board of Trustees, etc., supra*, for want of jurisdiction.

This Court dismissed another appeal, *O'Connor v. State of Nevada, et al.*, for want of jurisdiction, 449 U.S. 944, 101 S. Ct. 343, reh. den. 449 U.S. 1104, 101 S. Ct. 905.

Markoff v. American Heritage Insurance Company, 100 S. Ct. 725, was dismissed for want of a properly presented federal question.

The Court denied petitions for a writ of certiorari in *Elva Haugen v. Richard Bryan*, 430 U.S. 909, reh. den. 430 U.S. 976, and in *Elva Haugen v. Glen Taylor, et al.* 431 U.S. 902. It is important to note, however, that the Court requested that the respondent file

a response, which indicates that at least one member of the Court considered that the case had merit.

The Court also requested that the appellee file a response in *Markoff*, notwithstanding that the appellee had filed a written waiver.

In *Hayes v. Board of Trustees, etc.*, *supra*, and *O'Connor, supra*, this Court treated the appeal papers as a petition for certiorari, and denied certiorari, which indicates that the cases fell within this court's certiorari jurisdiction and presented a substantial federal question.

It is also important to note that all of the above cases, except *Markoff, supra*, were filed by persons proceeding in proper person and in forma pauperis.

There may well be many other cases which have been presented to this Court which concern the constitutionality of

Nevada Rule of Appellate Procedure 46(b).

The issue will be before this Court again this Term in at least three cases, the within action and Case No. A-264, *Hayes v. Honorable Justices of the Nevada Supreme Court, supra*, and in *O'Connor v. State of Nevada, supra*, on petitions for certiorari to the Ninth Circuit Court of Appeals.

II. THERE IS AN IMPORTANT QUESTION OF
FEDERAL LAW WHICH SHOULD BE SETTLED
BY THIS COURT

Nevada Rule of Appellate Procedure 46(b) deprives litigants of the right to seek redress of grievances, of the fundamental right of access to the courts and of the equal protection of the laws, and deprives them of liberty and property interests without due process of law.

The state of Nevada has never shown any compelling state interest, legitimate justification or rational basis for Nevada Rule of Appellate Procedure 46(b).

NRAP 46(b) effectively abolishes a person's right to litigate in the trial court as the Nevada Supreme Court is the only appellate court. All appeals are as of right. Nevada 3A(b) lists appealable determinations. NRAP 46(b) takes away this statutory right of appeal from persons who can not obtain an attorney.

Hayes was brought into the judicial process as a civil defendant and then was denied the right to fully defend herself and to assert her counterclaims.

A person may not be denied access to an appropriate judicial tribunal unless the bar to judicial relief can be constitutionally justified. *Mendez v. Heller*, 420 U.S. 916, 95 S. Ct. 1107. *Roberts v. LaVallee*, 389 U.S. 40.

It is well established that effective access to the courts is a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977). *Gaglie v.*

Ulibarri, 507 F. 2d 721 (9th Circuit 1974).

"Access to courts" encompasses all the means required for a litigant to get a fair hearing from the judiciary on grievances alleged by him. *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd* 404 U.S. 15, 92 S. Ct. 250.

This Court held in *Smith v. Bennett*, 365 U.S. 708, that to interpose any financial consideration between an indigent and his right to sue is to deny him the equal protection of the laws.

The constitutional guaranties of due process and equal protection require that person forced to settle their claim through the judicial process must be given a right to be heard and to have full access to the courts. *Boddie v. Connecticut*, 401 U.S. 731, 91 S.Ct. (1971).

Hayes meets the tests articulated in

Boddie, supra; United States v. Kras, 409 U.S. 434 (1973), and *Ontwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172.

She was compelled to file an Answer and compulsory counterclaims. There is no extrajudicial means for resolving her grievances against the defendants and no forum other than the courts available.

Hayes can not now litigate this action in the state courts. The Nevada Supreme Court has refused to reinstate the appeal notwithstanding that she is now an attorney. See p. 10a, *infra*.

The Justices have also refused to voluntarily disqualify themselves. See p. 10a, *infra*.

Hayes does not have the remedy of disqualification available, as Article 6, section 2 and Section 4 of the Nevada Constitution appear to limit the number

of Justices who can be disqualified to two. Hayes would be prejudiced as either appellant or respondent before the Nevada Supreme Court.

111. The Court Of Appeals Departed From The Accepted Course of Judicial Proceedings and Exceeded The Scope Of Review

The Court of Appeals departed from the accepted course of judicial proceedings, permitted the district court to depart from the accepted course, disregarded the prior judgments of this court and exceeded its jurisdiction and scope of review as an appellate court.

The Court of Appeals erred in the following respects:

1. It independently raised and decided an issue of fact which was not raised in the district court and which was not addressed in the district court's order.

The district court did not address the issue of NRAP 46(b) or discuss whether the Nevada Supreme Court had dismissed Hayes's appeal pursuant to NRAP 46(b). See p. 4a, *infra*.

The Court of Appeals, sua sponte, decided that Hayes's appeal was not dismissed pursuant to NRAP 46(b). See Memorandum, p. 1a, *infra*.

The Court of Appeal's conclusion was based on pure speculation and conjecture. There is no evidence in the record to support said conclusion. Hayes did not have an opportunity to challenge said supposition. It was raised for the first time in the Court's Memorandum.

There is no basis for the Court of Appeal's speculation that: (1) The Nevada Supreme Court would have granted Hayes an extension of time to file the Opening Brief: (2) that the court would have continued to grant continuances for more than a year until

September 24, 1980, the earliest date on which Hayes could be admitted to the Nevada Bar; (3) that the court would have accepted briefs filed in proper person, or (4) that the court would not have stricken a brief filed in proper person had Hayes done so.

The evidence shows that the Nevada Supreme Court would not have accepted a brief filed in proper person. In fact, in *Markoff, supra*, the Court struck a brief filed in proper person, see p. 18a, *infra*, and dismissed the appeal.

(2) The Court of Appeals gratuitously provided the defendant Justices with a defense which they themselves had not asserted and could not assert. In addition, the Justices would have been foreclosed from raising said defense for the reason that they refused to answer interrogatories pertaining to their dismissal of Hayes's appeal and the reason therefor.

(3) The Court of Appeals exceeded its jurisdiction as an appellate court.

(4) The Court, without giving any reason therefor or identifying any motion which might be frivolous, stated that some of Hayes's motions were frivolous. The Court failed to indicate that its comment was based on the district's court's comment concerning one motion filed by Hayes. The district's court's statement, in turn, was based on its misconception that Hayes had disobeyed one of its orders, which statement is disproved by the record.

(5) The Court of Appeals improvidently heard and decided an order which was not a final order pursuant to 28 U.S.C. Sec. 1291. The district court did not address or adjudicate Hayes's claims which arose after her Answer was filed in state court, Hayes's claim for a declaratory judgment that NRAP

46(b) is unconstitutional; Hayes's claims pertaining to NRAP 46(b), Hayes's claims brought under 15 U.S.C. Sec. 1681 and 1691 and her claims against defendant TRW, INC. which were independent of the action against the other defendants.

(6) The district court and court of appeals erred in concluding that Hayes's claims had been litigated in state court. Hayes has demonstrated that most of her claims arose after the state court answer was filed in April, 1977. The trial court's order, p. 13a, *infra*, clearly shows that the state court denied only Hayes's motions to have a trial of her counterclaims and to amend and supplement her original Answer and intended counterclaim. There never was any trial of Hayes's claims which accrued after the Answer was filed.

The docket sheet of the minute

proceedings clearly demonstrate that the only matters considered by the state court was whether it should hear Hayes's claims in that action. The docket sheet, p. 15a, *infra*, shows that there was no trial of Hayes's claims and no dismissal of said claims.

The district court erred in dismissing on a res judicata theory. The state court plaintiff, Valley Bank, voluntarily dismissed its own Complaint against Hayes, the state court defendant, without any inducement from Hayes and it abandoned its claims for attorney's fees and costs of suit. See Order, p. 16a, *infra*, and "Consent" filed by Valley Bank, p. 17a, *infra*.

(7) The district court and court of appeals erred in concluding that the federal court could not review the state court's decision that Hayes's pro se Answer did not

adequately set out her counterclaims. A federal court may freely review conclusions of law.

(8) The district court erred in granting defendants' motions to dismiss without giving Hayes an opportunity to obtain discovery and without ruling on pending discovery motions.

IV The Determinations Of The Lower Courts Are In Conflict With The Judgments Of This Honorable Court

The district court disregarded the findings of this court in *Hayes v. Valley Bank, supra*. This Court necessarily found that the Nevada Supreme Court had dismissed Hayes's appeal pursuant to NRAP 46(b); that the judgment did not rest on any adequate state ground; that the reason given--that the appeal was dismissed because Hayes did not file an Opening Brief--was an evasion,

as the Nevada Supreme Court had not given Hayes leave to file said brief in proper person, and that the issue of the constitutionality of NRAP 46(b) presented a substantial federal question. If it were otherwise, this Court would have dismissed for want of a substantial federal question.

The district court should have heard and decided the other issues raised by the implementation of NRAP 46(b).

The Court of Appeals not only erred in making findings of fact; it also decided the facts erroneously. The Court of Appeals' conclusion that the Nevada Supreme Court dismissed for a reason other than Hayes's inability to comply with NRAP 46(b) conflicts with this Court's necessary finding that the dismissal was made pursuant to NRAP 46(b) and that Hayes had standing to draw into question the constitutionality and validity of said statute.

CONCLUSION

For the foregoing reasons, Petitioner respectfully suggests that this Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JANICE HAYES, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANICE HAYES,

Plaintiff-Appellant,

v.

VALLEY BANK OF NEVADA, a
Nevada banking corp.,
HERBERT STOUT, E. MORGAN
WISOM, E. PERRY THOMAS, JOHN
WHELTON, individually and as
agents or officers of Valley
bank, WESTERN STATES BANKCARD
ASSOCIATION, a California
corp. TRW, INC., an Ohio corp.
STATE OF NEVADA, JOHN C. MOW-
BRAY, CAMERON BATJER, ELMER
GUNDERSON, NOEL MANOUKIAN and
CHARLES SPRINGER, individually
and as Justices of the NEVADA
SUPREME COURT,

Defendants-Appellees.

FILED

June 21, 1982

No. 81-5630

D.C. No.
79-182

MEMORANDUM

Appeal from the United States District
Court for the District of Nevada

Harry E. Claiborne, District Judge,
Presiding

Argued and submitted May 3, 1982

Before: BROWNING, Chief Judge, TANG and
FARRIS, Circuit Judges

Hayes attempted to relitigate, in
federal district court, the claims she

originally raised in the Nevada State Courts. We affirm the district court's dismissal.

Hayes's Nevada appeal was dismissed for failure to file a timely brief rather than because of Nevada Supreme Court Rule (sic)*46(b). Hayes was not entitled to assume that her pending motion for leave to appear in proper person tolled the time in which to file a brief. She could have preserved her rights by moving for an extension of time or by tendering her brief with her motion for leave to appear.

Since Rule 46(b) was not applied to Hayes, she has no standing to challenge its constitutionality. *Warrth v. Seldin*, 422 U.S. 490, 499 (1975).

Although we decline to award sanctions, we acknowledge a basis for the district court's conclusion that some of Hayes's actions border on being vexatious.

Affirmed.

* Should be: Nev. R. App. P. 46(b).

3a

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JANICE HAYES,

Plaintiff,

vs.

VALLEY BANK OF NEVADA,
etc., et al.,

Defendants.

ENTERED

June 25, 1981

79-182, HEC

MINUTES OF THE
COURT

PRESENT:

THE HONORABLE Harry E. Claiborne

DEPUTY CLERK: Lorraine Murphy

COUNSEL FOR PLAINTIFF(S) None appearing

COUNSEL FOR DEFENDANT(S) None Appearing

MINUTE ORDER IN CHAMBERS XXXXXX

IT IS ORDERED that the Motion to Alter
Order entered on May 18, 1981 and Motion
for Additional Findings of Fact and Con-
clusions of Law, filed May 28, 1981. and
treated as a Motion to Reconsider by the
Court, is denied.

ENTERED

May 19, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JANICE HAYES,

Plaintiff,

vs.

VALLEY BANK OF NEVADA,
et al.,

Defendants.

CV-LV-79-182,
HECMEMORANDUMDECISION

This matter is before the Court on motions to dismiss, on various grounds, filed on behalf of all Defendants, and further before the Court on Plaintiff's motion to strike and for sanctions.

Before dealing with the more substantive motions, this Court will deal quickly with Plaintiff's motion to strike and for sanctions. Plaintiff argues that Defendants Valley Bank, Stout, Wixom, and Thomas vexatiously delayed the filing of the reply in support of their motion to

dismiss and warrant sanctions under Local Rule 13. It would seem Plaintiff is the pot calling the kettle black. Need the Court remind Plaintiff that she was late in serving copies of the Amended Complaint on several of the Defendants herein, all in violation of the Court's Order of September 29, 1980. Suffice it to say that Plaintiff's motion, itself, borders on the verge of being vexatious and will be denied.

FACTS

On March 27, 1977, Defendant Valley Bank filed suit against the Plaintiff in the Eighth Judicial District Court, in and for the County of Clark, State of Nevada, for alleged non-payment on Plaintiff's MasterCard account, issued through defendant Valley Bank. Plaintiff, acting pro se, filed an Answer to the state action, including what she alleged was a counterclaim, although not denominated as such. The trial court dismissed that action against the

plaintiff, finding that restitution had been made to Valley Bank.

Plaintiff petitioned the trial court to reconsider its dismissal of the action and to allow Plaintiff's "counterclaim." In denying Plaintiff's petition for reconsideration (sic), the trial court necessarily found that whatever Plaintiff filed in answer to Valley Bank's Complaint, it was not a counterclaim. This Court is not inclined, nor is it capable of returning to 1977 and redeciding the issue.

Plaintiff then appealed to the Nevada Supreme Court, which appeal was eventually dismissed pursuant to Rule 46(b), Nevada Rules of Appellate Procedure. Rule 46(b) provides: "No party, except a habeas corpus petitioner, may appear in proper person before the Nevada Supreme Court."

Seeking to have NRAP 46(b) declared unconstitutional, Plaintiff brought a declaratory relief action in the United

States District Court, District of Nevada, against the Nevada Supreme Court and the State of Nevada. Without opinion, Judge Foley dismissed that action, from which an appeal is now before the Ninth Circuit Court of Appeals.

Now a member of the Nevada State Bar and admitted to practice before this Court, Plaintiff has brought the instant action which stems from credit differences with Valley Bank in 1976 and 1977. (sic).

JURISDICTION

Defendants have challenged this Court's jurisdiction over Plaintiff's action on various grounds. It is virtually axiomatic that a court of original jurisdiction can not provide appellate review to a state court decision. *Booker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Only where a state court judgment is void, either because the state court lacked jurisdiction of the subject matter or of the parties to

the action, may the state court decision be reviewed in federal court. *Daniels v. Thomas*, 225 F. 2d 795, 797 (CA 9, 1955); see also *Rapoport v. Rapoport*, 416 F. 2d 41 (CA 9, 1969).

The issues presented herein were effectively dealt with in *Town of Hopkins, S.C. v. Cobb*, 466 F. Supp. 1212 (D.S.C. 1979):

The lack of appellate jurisdiction by the (federal) district courts is not altered (1) by allegations of the unconstitutionality of a state statute involved in the previous state action between the parties (citations omitted); (2) by a collateral attack asserting violations of 42 U.S.C. Sec. 1983 (citations omitted; or (3) by alleged defects in the state's appellate procedure (citations omitted).

Town of Hopkins, S.C. v. Cobb, supra at 1214.

I find that Plaintiff's action herein is, in effect, an appeal from the state trial court's decision to not recognize her counterclaim in that action. That Plaintiff

7a

now alleges jurisdiction under several federal statutes does not aid her cause, since claims against any defendants in addition to those originally named in Plaintiff's unrecognized counterclaim were compulsory in nature and thereafter barred. Rule 13, Nevada Rules of Civil Procedure; Rule 13, Federal Rules of Civil Procedure. (sic).

Accordingly, Plaintiff's action should be dismissed with prejudice as to all Defendants.

DATED: This 18th day of May, 1981.

Harry Claiborne
CHIEF JUDGE, U.S. DISTRICT
COURT

7a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANICE HAYES,

Plaintiff-Appellant,

vs.

THE HONORABLE JUSTICES OF
THE SUPREME COURT OF NEVADA;
JOHN C. MOWBRAY, CAMERON M.
BATJER, ELMER GUNDERSON, NOEL
MANOUKIAN, GORDON THOMPSON,
INDIVIDUALLY and in their
capacities as JUSTICES OF THE
NEVADA SUPREME COURT,

Defendants-Appellees.

FILED

June 17, 1981

CA No. 80-5311

DC No. 79-142

MEMORANDUM

Appeal from the United States District
Court for the District of Nevada

Roger D. Foley, District Judge,
Presiding

Argued and submitted May 3, 1982

Before: BROWNING, Chief Judge, TANG and
FARRIS, Circuit Judges.

We find no merit in Hayes's appeal of
the district court's dismissal of her action.
Her appeal before the Nevada Supreme Court

was not dismissed on the basis of Nev. R. App. P. (sic) 44 and 46(b)*, but at her request.

Hayes asserts no cognizable ground to enjoin the Nevada Supreme Court in the federal district court. *Mitchum v. Foster*, 407 U.S. 225 passim, (1972); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970). Whether the dismissal was with or without prejudice is no basis for injunctive relief. Even a dismissal without prejudice would not erase the state trial court's decision on the merits.

We find no error in the district court's dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Affirmed.

- * Nev. R. App. P. 44 is error.
Should be Supreme Court Rule 44.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

VALLEY BANK OF NEVADA,

Respondent.

No. 11631

FILED

August 25, 1981

ORDER

Appellant has filed a petition for rehearing of our order denying her motion to reinstate this appeal. The petition for rehearing is denied. See WRAP 40(c).

Appellant also requests a statement of the reasons for our denial of reinstatement of the appeal. The reasons for our original dismissal of this appeal are adequately stated in our order of October 4, 1979. The reasons for denial of appellant's petition for rehearing were adequately stated in our order of

December 3, 1979. As can be seen from those orders, the fact that appellant is now an attorney is irrelevant to the reasons for the dismissal of this appeal.

Finally, appellant requests that the justices voluntarily recuse themselves from hearing these motions and further matters in this case. The request is denied.

It is so ORDERED.

Signed
GUNDERSON

Signed
MANOUKIAN

Signed
BATJER

Signed
SPRINGER

Signed
MOWBRAY

11a

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

VALLEY BANK OF NEVADA,

Respondent.

No. 11631

FILED

DEC 3 1979

ORDER

Janice Hayes petitions for a rehearing of our order dismissing her appeal for failure to file briefs pursuant to NRAP 31(a) contending that, since she filed a motion for leave to appear in proper person, see NRAP 46(b), and a motion to waive NRAP 30 and NRAP 32, she is not required to file briefs until we make a decision on those motions.

NRAP 31 provides procedures for gaining extensions of time for filing briefs and for disposition of the appeal.

11a (cont.)

in the event that briefs are not timely filed. There is nothing in NRAP 30, NRAP 32, or NRAP 46(b) to suggest that we will automatically waive the requirements of NRAP 31. Accordingly, we perceive no error in our dismissal of this appeal and hereby deny the petition for rehearing.

It is so ORDERED.

Signed
Mowbray

Signed
Thompson

Signed
GUNDERSON

Signed
Manoukian

Signed
Batjer

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

VALLEY BANK OF NEVADA,

Respondent.

FILED

October 4 1979

No. 11631

ORDER DISMISSING APPEAL

Under the provision of N.R.A.P. 31(a), appellant was required to serve and file the opening brief on or before June 25, 1979. She has neither filed the brief nor tendered any explanation for her failure to do so. Under these circumstances, we presume further pursuit of this matter has been abandoned. Accordingly, we

ORDER the appeal dismissed.

Mowbray C.J.

Thompson J.

BATJER J.

13a

CASE NO. A 166497

DEPT. III

CIVIL DOCKET "E"

FILED

OCT 8, 1978

IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE COUNTY

OF CLARK

* * * * *

VALLEY BANK OF NEVADA,
a Nevada banking corporation,

Plaintiff,

vs.

JANICE M. HAYES,

Defendant.

ORDER

The Defendant's MOTION FOR
SEPARATE TRIAL OF DEFENDANT'S COUNTER-
CLAIM AND MOTION FOR LEAVE TO AMEND AND
SUPPLEMENT COUNTERCLAIM having come on
for hearing before the above entitled
court on the 15th day of September, 1978,
and the Defendant, JANICE M. HAYES,

appearing in proper person and the Plaintiff being represented by JOHN C. WHELTON, ESQ. of the firm of FREEDMAN & WHELTON, and Court having heard the oral argument of Defendant and Plaintiff's counsel, and the Court having examined the Points and Authorities, Affidavits and the Pleadings on file in this matter, and the Court having found that no Counterclaim was filed by the Defendant in this action, and the Court being fully advised in the premises and good cause appearing therefore:

IT IS HEREBY ORDERED that Defendant's MOTION FOR SEPARATE TRIAL OF DEFENDANT'S COUNTERCLAIM AND MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COUNTERCLAIM is denied.

DATED this 6th day of October, 1982

Joseph Paulikowski
DISTRICT JUDGE

15a

CASE NO. A166497 TITLE VALLEY BANK OF
NEVADA V. JANICE HAYES

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES and HEARING

8-14-78

JOSEPH S.
PAVLIKOWSKI

DEFENDANT'S MOTION FOR
SEPARATE TRIAL OF DEFENDANT'S
COUNTERCLAIM AND MOTION FOR
LEAVE TO AMEND AND SUPPLEMENT
COUNTERCLAIM and STATUS CHECK

Plaintiff neither present

nor represented by counsel

FREEDMAN & WHELTON.

Defendant neither present

nor represented by counsel.

By the Court ordered, this

matter is continued until

9-15-78, 9:00 A.M. Dept. No.3

9-15-78

JUDGE JOSEPH
PAVLIKOWSKI

Not reported

DEFENDANT'S MOTION FOR SEP-

ARATE TRIAL OF DEFENDANT'S

COUNTERCLAIM AND MOTION FOR

LEAVE AMEND AND SUPPLEMENT

COUNTERCLAIM and STATUS CHECK

/ / /

15a (cont.)

Plaintiff represented by

JOHN C. WHELTON, ESQ.

DEFT. JANICE MARIE HAYES

PRESENT WITHOUT BENEFIT OF

COUNSEL, IN PROPER PERSON.

DEFT. PRESENTED HER MOTION

AND ARGUED IN SUPPORT

THEREOF.

ARGUMENT IN OPPOSITION BY

MR. WHELTON.

BY THE COURT ORDERED, THIS

MATTER IS UNDER ADVISEMENT.

12-27-78
JOSEPH S.
PAVLIKOWSKI
DEPT. III

DEFENDANT'S MOTION TO REHEAR
AND RECONSIDER THE ORDER
MADE ON 10/6/78.

DEFENDANT'S MOTION TO AMEND
OR VACATE THE ORDER ENTERED
ON 6/9/78.

DEFENDANT'S MOTION TO STRIKE
THE POINTS AND AUTHORITIES
AND AFFIDAVITS OF PLAINTIFF.

Plaintiff represented by

John C. Whelton.

Defendant present in proper
person.

/ / /

MINUTES --- CIVIL

12-27-78

(cont.)

JOSEPH S.
PAVLIKOWSKI
JUDGE

Court stated it believed it
had ruled on these motions

DEPT. III

previously. Argument by
Defendant. Argument in
opposition by Mr. Whelton.
BY THE COURT ORDERED, the
orders will stand. Defen-
dant moved to rehear, and
COURT ORDERED, motion is
denied.

CASE NO. A 166497

FILED

JUNE 9 1978

IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE COUNTY
OF CLARK

VALLEY BANK OF NEVADA,
a Nevada banking corporation,
Plaintiff,

vs.

JANICE M. HAYES,
Defendant.

ORDER

IT IS HEREBY ORDERED that the
above matter be dismissed, with prejudice,
as to the Defendant JANICE M. HAYES, as
the Defendant, JANICE M. HAYES, has made
full restitution to the Plaintiff.

DATED and DONE this 8th day of
June, 1978.

Joseph Pavlikowski
DISTRICT JUDGE

17a

CASE NO. A 166497

FILED

DEPARTMENT III

JUNE 8 1978

CIVIL DOCKET "E"

IN THE EIGHTH JUDICIAL DISTRICT

COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

* * * * *

VALLEY BANK OF NEVADA,)	
a Nevada banking corporation,)	
)	CONSENT TO
Plaintiff,)	DISMISSAL
)	OF ACTION
vs.)	WITH
)	<u>PREJUDICE</u>
JANICE M. HAYES,)	
)	
Defendant.)	

The undersigned attorney for Plaintiff in the above-entitled action hereby consents to a dismissal of this action, with prejudice, as to the Defendant, JANICE M. HAYES as full restitution was made to Plaintiff by the Defendant.

DATED this 8th day of June, 1978.

FREEDMAN & WHELTON

By John C. Whelton
JOHN C. WHELTON, ESQ.
Attorney for Plaintiff

NO. 11747

V.M. MARKOFF aka MIKE M. MARKOFF,

Appellant,

vs.

AMERICAN HERITAGE LIFE INSURANCE CO,
SUSAN FRANCIS AND RENEE SADKO,

Respondents.

Appeal from the EIGHTH Judicial District
Court, CLARK COUNTY, Nevada

Joseph S. Pavlikowski, Judge

Notice of Appeal filed March 26, 1979

Judgment appealed from filed April 27, 1978

1979

April 9 Filing Record on Appeal, Vols.
1 and II.

May 16 Filing Appellant's Opening
Brief

17 Filing Motion to Strike

22 Filing Markoff's Response to
American's Motion To Strike
The Opening Brief.

June 12 Filing Motion for Extension of
Time to File Brief of Respondent.

13 Filing Orders respondents may
have to and including two weeks
after the Court rules on its
Motion to strike to file brief.

18(a) cont.

Docket sheet, Nevada Supreme Court.
VASIL M. MARKOFF aka MIKE MARKOFF
v. AMERICAN HERITAGE INSURANCE CO, ET AL.

1979

June 14 Filing Order. We grant
respondent's motion to strike
appellant's opening brief, filed
in pro per.

19 . . .

29 Filing Order appellant's in pro
per motion for further orders
is denied.

29

29 Filing Order, "ORDER it dismissed."

July 10 Filing Notice of Appeal from the
Supreme Court of the State of
Nevada to the Supreme Court of
the United States

IN THE SUPREME COURT OF THE STATE
OF NEVADA

IN THE MATTER OF THE AMENDMENT OF THE
NEVADA RULES OF APPELLATE PROCEDURE, RULE
46 RELATING TO THE PRACTICE OF LAW BEFORE
THE SUPREME COURT.

ORDER AMENDING RULE 46(b), NEVADA
RULES OF APPELLATE PROCEDURE

IT IS HEREBY ORDERED that Rule 46(b) of
the Nevada Rules of Appellate Procedure
be, and the same hereby is, amended as
follows:

(b) Appearnces in Proper Person. (No
party, except a habeas corpus peti-
tioner, may appear in proper person
before the Supreme Court.) *With leave
of the Supreme Court, a party may file,
in proper person, written briefs and
papers submitted in accordance with
these rules.*

. . .

Dated this 22nd day of October, 1981.

BY THE COURT

SUPREME COURT RULES

Rule 44. PERSON MAY APPEAR IN HIS OWN
BEHALF.

Nothing in these rules shall be
so construed as to prevent any person
from appearing in his own behalf in
any court in this state except the
supreme court.

82-956

No. A-264

Office-Supreme Court, U.S.

FILED

NOV 23 1982

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

JANICE HAYES,

Petitioner,

vs.

VALLEY BANK OF NEVADA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To the United
States Court of Appeals For The Ninth Circuit

NOTICE OF MOTION FILED IN UNITED STATES COURT OF
APPEALS FOR CORRECTION OF CLERICAL MISTAKE NUNC
PRO TUNC IN MEMORANDUM ENTERED JUNE 21, 1982

JANICE HAYES, ESQ.
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135

Petitioner

(Petitioner has not been a member
of the Bar of Nevada for a
sufficient length of time to be
admitted to the Bar of this Court)

IN THE SUPREME COURT OF THE UNITED STATES

JANICE HAYES,

Petitioner,

vs.

VALLEY BANK OF NEVADA, et al.,

Respondents.

The Petitioner, Janice Hayes, ("Hayes"), respectfully asks that this Honorable Court take Notice that she has filed a motion in the United States Court of Appeals for the Ninth Circuit asking that that Court correct the clerical mistake in its Memorandum issued June 21, 1982.

A copy of said Motion is appended hereto. Hayes also asks the Court of Appeals to amend or supplement the last paragraph of its Memorandum to reflect that the Court's comment therein was a response to and denial of appellee TYMSHARE's motion for attorney's fees and imposition of sanctions against Hayes.

Hayes also asks the Court of Appeals to enter its ruling on a motion filed August 27, 1982, that the Court correct its clerical mistake in the Memorandum entered in a related case, No. 80-5311, Hayes v. Honorable Justices of the Nevada Supreme Court.

Both cases concern the constitutionality and validity of Nevada Rule of Appellate Procedure 46(b), which prohibited litigation in proper person before the Nevada Supreme Court. Hayes challenged the constitutionality of dismissals made

of her civil appeals of right by the Nevada Supreme Court without any review or consideration of the merits, which dismissals were made pursuant to said Nev. R. of App. P. 46(b) and Nevada Supreme Court Rule 44.

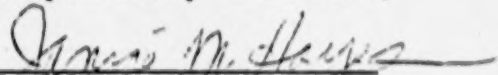
Hayes also moved the Court of Appeals to vacate its Memorandum as that Court did not have jurisdiction inasmuch as the district court's order was not a final judgment, pursuant to 28 U.S.C. 1291, for the reason that the district court did not adjudicate any of Hayes's claims and did not address or rule on the federal questions presented. (The district court did, however, state that Hayes's appeal, Valley Bank v. Hayes, sub nom, Hayes v. Valley Bank, was dismissed by the Nevada Supreme Court pursuant to and because of Nev. R. App. P. 46(b). The Court of Appeals made an opposite finding of fact without explanation, i.e., it determined that Hayes's state court appeal was not dismissed pursuant to Nev. R. of App. P. 46(b), and concluded that Hayes, therefore, had no standing to draw the constitutionality of said Rule into question.)

There is no evidence in the record to support the speculative conclusions and suppositions of the Court of Appeals.

Hayes's Petition for Writ of Certiorari was timely received in this Court on the due date, but said Petition was not acceptable in that the Appendix items were not legible. Hayes has not received either the returned Petition or the Clerk's letter listing deficiencies. Nevertheless, Hayes

has had the entire petition retyped and the appendix items, consisting of judgments of the federal courts and docket entries and orders of the state trial court and Nevada Supreme Court typed and will file forty corrected copies soon as set out in her letter of November 20, 1982 to the Clerk of this Court, a copy of which is appended hereto.

Respectfully submitted,



JANICE M. HAYES, ESQ.

3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135

Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANICE HAYES,

Plaintiff-Appellant,

vs.

VALLEY BANK OF NEVADA, et al.,

Defendants-Appellees

CASE NO. 81-5630

D.C.# CV-LV-79-132, REC

MOTION TO CORRECT CLERICAL MISTAKE NUNC PRO TUNC
IN ORDER ENTERED ON JUNE 21, 1982

JANICE HAYES, ESQ.
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135
Plaintiff-Appellant
Attorney for Plaintiff-Appellant

November 14, 1982

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 JANICE HAYES,

5 Plaintiff-Appellant,

6 vs.

7 VALLEY BANK OF NEVADA, et al.,

8 Defendants-Appellees
9

CASE NO. 81-5630

MOTION TO CORRECT NUNC
PRO TUNC THE CLERICAL
MISTAKE IN MEMORANDUM
ENTERED JUNE 21, 1982
AND TO AMEND LAST
PARAGRAPH OF MEMORANDUM

10 The Plaintiff-Appellant, JANICE HAYES, moves this
11 Honorable Court to correct nunc pro tunc the clerical mistake
12 in its Memorandum entered herein on June 21, 1982, so as to
13 state "Hayes's Nevada appeal was dismissed for failure to file
14 a timely brief rather than because of Nevada Rule of Appellate
15 Procedure 46(b)." instead of "Nevada Supreme Court Rule 46(b)."
16 as the Memorandum presently incorrectly provides.

17 Plaintiff-Appellant also respectfully asks that this
18 Court supplement the final paragraph of said Memorandum to
19 reflect that its comment therein was a response to and denial of
20 Defendant-Appellee TYMSHARE TRANSACTION SERVICES, INC.'s
21 motion for attorney's fees and motion for sanctions, and was not
22 a spontaneous finding by this Court.

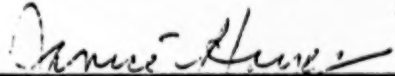
23 This motion is made and based upon the pleadings and
24 papers on file herein and on Federal Rule of Civil Procedure
25 60(a) and the memorandum submitted herewith.

26 This motion is made in good faith and for good cause.
27 The Memorandum judgment of this Court in this action and the
28

1 Memorandum entered in a related case, No. 80-5311, Hayes v.
2 Justices of the Nevada Supreme Court, both contain errors as to
3 the Nevada statutes being challenged. Plaintiff-Appellant has
4 drawn into question the constitutionality and validity of
5 Nevada Rule of Appellate Procedure 46(b) and Nevada Supreme
6 Court Rule 44.

7 Inasmuch as Hayes has filed and will file a Petition
8 For Writ of Certiorari in the United States Supreme Court in
9 both cases, it is important that the Memorandum orders of this
10 Court correctly reflect which rules are being challenged.

11 Respectfully submitted,

12 
13 JANICE HAYES, ESQ.
14 3391 S. El Camino Road
15 Las Vegas, Nevada 89102
16 Telephone: (702) 871-5135
17 Plaintiff-Appellant
18 Attorney for Plaintiff-Appellant

19 POINTS AND AUTHORITIES

20 Plaintiff-Appellant, JANICE HAYES, ("Hayes"), brought
21 the instant action in the federal district court because she
22 was prevented by Nevada Rule of Appellate Procedure 46(b) from
23 litigating his claims in state court.

24 The Nevada Supreme Court had dismissed Hayes's civil
25 appeal of right because she was then a layperson, a law student,
26 and could not comply with the provisions of Nevada Rule of
27 Appellate Procedure 46(b). The court, without ruling on her
28 motion for leave to appear in proper person and to file the

1 Opening Brief in proper person, sua sponte, without notice to
2 Hayes or warning that her appeal of right was subject to dis-
3 missal, dismissed the appeal because she had not filed the
4 Opening Brief.

5 Nevada Rule of Appellate Procedure 46(b), prior to its
6 1981 amendment, provided that:

7 "No person, except a habeas corpus petitioner,
8 may appear in proper person before the Supreme
9 Court."

10 A copy of said Rule is appended hereto as Exhibit 1.
11 A copy of (Nevada) Supreme Court Rule 44 is appended hereto as
12 Exhibit 2.

13 This court apparently, in this case and in 80-5311,
14 supra, confused these rules with Supreme Court Rule 46(b) and
15 N.R.A.P. 44. The Rules of Appellate Procedure and Rules of the
16 Nevada Supreme Court are two separate, distinct sets of rules.

17 (Nevada) Supreme Court Rule 46(b) and N.R.A.P. 44 are
18 NOT at issue in this case or in Case No. 80-5311 (Justices), nor
19 has Hayes challenged said rules.

20 Hayes, therefore, requests that this Court correct its
21 Memorandum so that the first sentence of the second paragraph
22 reads as follows:

23 "Hayes's Nevada appeal was dismissed for failure
24 to file a timely brief rather than because of
25 Nevada Rule of Appellate Procedure 46(b)."

26 II THE COMMENT REGARDING ALLEGED VEXATIOUS MOTIONS

27 Hayes also asks the Court to supplement the last
28 paragraph of its Memorandum to reflect that this court's comment

1 that "Although we decline to award sanctions in the instant
2 appeal, we acknowledge a basis for the district court's
3 conclusion that some of Hayes's actions border on being
4 vexatious," was in response to and served as a denial of
5 defendant-appellee TYMSHARE TRANSACTION SERVICES, INC.'s motions
6 for attorney's fees and award of sanctions, and that TYMSHARE
7 had requested a ruling on its motions.

8 Hayes also asks the Court to note that the district court
9 referred only to one motion brought by Hayes, which motion was
10 meritorious. Hayes had moved the district court to strike a
11 Reply Memorandum of Points and Authorities filed by defendant
12 VALLEY BANK, for the valid reason that said memorandum was filed
13 thirty-three days late, in violation of Local Rules and to
14 Hayes's disadvantage. Valley Bank offered no excuse or justi-
15 fication for said late filing, nor did it seek leave to file its
16 tardy memorandum.

17 The district court, without considering the merits of
18 Hayes's motion, denied it because of the court's mistaken im-
19 pression that Hayes had allegedly not complied with an order
20 regarding service of the defendants. Hayes had timely delivered
21 sufficient copies of the Summons and Complaint with instructions
22 to serve all defendants to the United States Marshal. (She was
23 at that time proceeding in proper person.)

24 Hayes respectfully suggests that this court, rather than
25 concluding that Hayes's motion was vexatious, should have
26 considered whether the district court acted improperly in
27 refusing to decide a motion on its merits for the perceived
28 reason that Hayes had not complied with an unrelated order.

1 For the reasons set forth above, Hayes asks that this
2 Court correct its clerical error regarding Nevada Rule of
3 Appellate Procedure nunc pro tunc, and that the Court additionally
4 supplement the last paragraph of its Memorandum.

5 Hayes also asks that this Court issue an order correcting
6 its Memorandum in Case No. 80-5311. Her Motion for Correction
7 was filed as of August 27, 1982, two and a half months ago.

8 Respectfully submitted,

9 Janice M. Hayes
10 JANICE M. HAYES, ESQ.
11 3391 S. El Camino Road
12 Las Vegas, Nevada 89102
13 Telephone: (702) 871-5135
14 Attorney for Plaintiff-Appellant
15 Plaintiff-Appellant
16
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DEC 1 1981

IN THE SUPREME COURT OF THE
STATE OF NEVADA

IN THE MATTER OF THE AMENDMENT OF THE NEVADA RULES OF
APPELLATE PROCEDURE, RULE 46 RELATING TO THE PRACTICE
OF LAW BEFORE THE SUPREME COURT.

ORDER AMENDING RULE 46(b), NEVADA RULES
OF APPELLATE PROCEDURE

IT IS HEREBY ORDERED that Rule 46(b) of the Nevada Rules of Appel-
late Procedure be, and the same hereby is, amended as follows:

(b) Appearances in Proper Person. [No party, except a habeas
corpus petitioner, may appear in proper person before the Supreme
Court.] *With leave of the Supreme Court, a party may file, in proper
person, written briefs and papers submitted in accordance with these
rules.*

IT IS HEREBY FURTHER ORDERED that this order shall become effective
sixty (60) days after its entry. Publication of this order shall be made by
the mailing of a copy by the clerk of this Court to each member of the
State Bar of Nevada according to the clerk's official list of membership of
such bar (which will include all district judges and district attorneys), and
the certificate of the clerk of this Court as to the accomplishment of such
mailing shall be conclusive evidence of the adoption and publication of
the foregoing amended Rule, in accordance with the provisions of Nevada
Revised Statute 2.120.

Dated this 22nd day of October, 1981.

BY THE COURT

E. M. GUNDERSON, *Chief Justice*

NOEL E. MANOUXIAN
Associate Justice

CAMERON M. BATTIER
Associate Justice

CHARLES E. SPRINGER
Associate Justice

JOHN MOWBRAY
Associate Justice

EXHIBIT 1

Clark County Law Library

endorsed upon the pleading so filed, and service upon such attorney shall be deemed to be service upon the attorney filing the pleading or other paper.

5. Except as provided in subsections 1, 2 and 3 of this rule, an attorney admitted to practice in another jurisdiction shall not be admitted to practice law in the State of Nevada by motion or on the basis of reciprocity. Attorney applicants must make application for admission and be examined in accordance with Rules 49 to 75, inclusive, in the same manner as all other applicants.

[As amended; effective December 20, 1973.]

Rule 43. Appearance of attorneys employed by or representing United States Government; affidavits.

1. Attorneys employed by or representing the United States Government, in matters before the courts of this state in which the United States has a direct interest, shall be permitted by the courts of this state to appear on behalf of the United States Government and to represent the interests thereof in any litigation in which the United States Government is interested.

2. At the time of appearing in any such suit on behalf of the United States Government, such attorney shall file with the clerk of the court, if there is one, and if there is not one, then with the judge or justice of such court, an affidavit to the effect that the United States Government is interested in the matter before the court in which such appearance is being entered, that such person represents the United States Government and that his appearance is made in performance of his duties as such representative of the United States Government and is made in pursuance of this rule.

Rule 44. Person may appear in his own behalf. Nothing in these rules shall be so construed as to prevent any person from appearing in his own behalf in any court in this state except the supreme court.

Rule 45. Authority of attorney. An attorney and counselor shall have authority:

1. To bind his client in procedural matters in any of the steps of an action or proceeding.

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or within 1 year after judgment and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction in the judgment.

Rule 46. Withdrawal or change of attorney. The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:

1. Upon consent of the attorney, approved by the client.

2. Upon the order of the court or judge thereof on the application of the attorney or the client.

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 JANICE HAYES,

5 Plaintiff-Appellant,

6 v.

7 VALLEY BANK OF NEVADA, et al.,

8 Defendants-Appellees.
9

CASE NO. CA 81-5630

DECLARATION

10 COMES NOW the plaintiff-appellant, JANICE HAYES, and
11 under the penalties of perjury, states that:

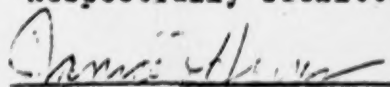
12 1. She is an attorney and member of the Bar of this
13 Court and is representing herself in this action.

14 2. This motion is made in good faith, for good cause and
15 not for any purpose of delay.

16 3. Hayes asks this Court to correct the error in its
17 Memorandum entered June 21, 1982 in this action, wherein the
18 Court erroneously referred to "Nevada Supreme Court Rule 46(b),"
19 and whereas the correct reference should be to "Nevada Rule of
20 Appellate Procedure 46(b)."

21 4. Hayes intends to seek a Petition for Writ of Certior-
22 ari and said petition was timely filed on October 18, 1982. She
23 wishes to have the Memorandum corrected for the Supreme Court's
24 review.

25 Respectfully submitted,

26 

27 JANICE HAYES, ESQ.
28 3391 S. El Camino Road
Las Vegas, Nevada 89102
Plaintiff-Appellant
Attorney for plaintiff-
Appellant

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 JANICE HAZES,

5 Plaintiff-Appellant,

6 vs.

7 VALLEY BANK OF NEVADA, et al.,

8 Defendants-Appellees.
9

CASE NO. 81-5630

PROPOSED ORDER

10
11 For good cause shown and it appearing to the Court that
12 the clerical error in the Memorandum entered June 21, 1982,
13 should be corrected nunc pro tunc,

14 IT IS ORDERED that the first sentence of the second
15 paragraph of said Memorandum be corrected to provide as follows:

16 "Hayes's Nevada appeal was dismissed for failure to
17 file a timely brief rather than because of Nevada
18 Rule of Appellate Procedure 46(b)."

19 IT IS FURTHER ORDERED that the last paragraph be amended
20 and supplemented to reflect that the last paragraph of the
21 Memorandum was a reference to and denial of TYMSHARE TRANSACTION
22 SERVICES, INC.'s motions for attorney's fees and for sanctions.

23 DATED this _____ day of _____, 1982

24 _____
CIRCUIT JUDGE

25 _____
CIRCUIT JUDGE

26 _____
CIRCUIT JUDGE
27
28

JANICE M. HAYES
ATTORNEY AT LAW

3391 S. EL CAMINO ROAD
LAS VEGAS, NEVADA 89102

(702) 871-5135

November 20, 1982

The Honorable Alexander Stevas
Clerk of the Court
United States Supreme Court
Washington, D.C. 20543

Re: Janice Hayes v. Valley Bank of Nevada, et al.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

- (1) Notice of filing of Motion in the Court of Appeals for correction of clerical mistake in its memorandum, to be distributed to Justices of this Court.
- (2) I have never received the original (ribbon) copy of my Petition for Certiorari, nor letter from Clerk, which Clerk stated was mailed to me.
- (3) I have not received copy of Brief in Opposition in Opposition allegedly filed on behalf of appellees, Justices of the Nevada Supreme Court.
- (4) Request that Petition not be distributed to Court until the forty corrected copies of Petition are received and I have opportunity to file Reply to Brief in Opposition.

Dear Mr. Stevas,

Please find enclosed the original and ten copies of NOTICE OF FILING MOTION FOR CORRECTION OF CLERICAL ERROR IN MEMORANDUM NUNC PRO TUNC. Said motion was filed in the Ninth Circuit Court of Appeals.

Please distribute a copy to each Justice and return one copy to me in the enclosed, stamped, self-addressed envelope.

My Petition for Writ of Certiorari was timely received by this Court on October 18, 1982. I have been informed several times in telephone conversations with Mr. Slade and other members of your staff that the Petition had to be redone, it that the Appendix items were not legible and the pages were uneven. I was advised that it would be returned to me along with a letter detailing corrections to be made.

On various occasions, I have been told that the original was mailed on October 19, October 20 and October 29. I still have not received it. I wanted the original so that new copies could be run from the ribbon copy. I also wanted to know about all corrections that needed to be made.

November 20, 1982

I have written several letters to you and Mr. Slade, but have received no response.

I have, therefore, had the pages retyped and had all of the appendix pages typed out. The forty copies should arrive in your office very soon. I did not know if all of the Appendix items were so illegible that they needed to be typed out.

(3) I received today letters from two counsel which were identical in content. Each attorney stated that he is "aware of the contents and arguments made in the Brief in Opposition. . . submitted by the Nevada Attorney General's Office, counsel for respondents State of Nevada and (Nevada Supreme Court Justices.).

Please be advised that I have not received any Brief in Opposition to my Petition for Certiorari.

(4) I intend to file a reply to said Brief when I receive a copy.

I request, therefore, that you do not distribute the Petition or Brief in Opposition until I have received the Brief and have had an opportunity to respond.

As my Notice states, I have requested the Court of Appeals to correct the clerical error in its Memorandum and to amend its Memorandum to reflect that the comment in its last paragraph was made in response to and denial of TYMSHARE's motion for attorney's fees and imposition of sanctions.

I have also filed a similar motion, on August 27, 1982, that the Court of Appeals correct its clerical error in the Memorandum entered in Case No. 80-5311, Hayes v. Honorable Justices of the Nevada Supreme Court. No ruling has been entered on said motion.

I will file a Petition for Certiorari in Case No. 80-5311, supra, on December 10, 1982. In both cases, the Court of Appeal's Memorandum incorrectly stated the Rule number of the Nevada Rules which I am challenging, which are Nevada Rule of Appellate Procedure 46(b) and (Nevada) Supreme Court Rule 44.

I have also filed a Motion that the Court of Appeals vacate its judgment and dismiss both of these cases for want of jurisdiction in that in each case the Court improvidently heard an appeal which was not taken from an appealable Order of the district court. If said motions are granted, the petitions for certiorari to this court would be unnecessary.

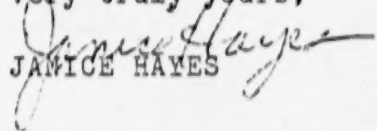
page 3
Alexander Stevas

November 20, 1982

Any delay in distributing the Petition in this action would, therefore, be advantageous to all of the parties and especially to the Court.

Your assistance in not distributing the Petition until I have received and responded to the Brief in Opposition would be greatly appreciated.

Very truly yours,


JANICE HAYES

cc: All counsel of record and to Attorney General Richard Bryan

Enc: Copies of Notice of filing motion in Court of Appeals, to be distributed to the Court.

Copy of letter from counsel for respondent Valley Bank, which indicates that Brief in Opposition was filed in this Court, of which Brief I have not received a copy.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

JANICE HAYES,

Petitioner,

vs.

VALLEY BANK OF NEVADA, et al.,

Respondents.

AFFIDAVIT OF SERVICE

STATE OF NEVADA)

COUNTY OF CLARK)

ss:

I, JANICE HAYES, being first duly sworn, depose and say that I am the Petitioner in this action; that I a member of the Bar of Nevada; that I have not been an attorney for a sufficient length of time to be admitted to the Bar of this Court; that I am appearing on my own behalf in proper person; that I served the NOTICE OF MOTION FILED IN UNITED STATES COURT OF APPEAL FOR CORRECTION OF CLERICAL MISTAKE NUNC PRO TUNC by mailing true copies thereof in sealed envelopes, postage thereon prepaid, addressed to counsel for the Respondents as follows: on the 2nd day of November, 1982:

Lorin Parraguirre, Esq.
302 E. Carson Ave., Suite 1104
Las Vegas, Nevada 89101

John C. Whelton, Esq.
411 So. Sixth St.
Las Vegas, Nevada 89101

/ / /

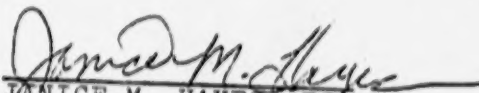
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 S. Fourth St.
Las Vegas, Nevada 89101

Corby Arnold, Esq.
302 E. Carson Ave., Suite 1000
Las Vegas, Nevada 89101

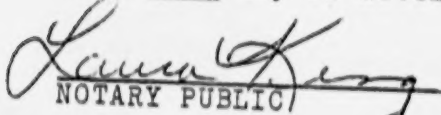
Kenneth G. Freitas, Esq.
302 E. Carson Ave., Suite 703

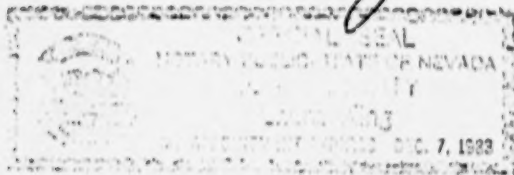
Deputy Attorney General William Isaef
Heroes Memorial Building
Carson City, Nevada 89710

All parties required to be served have been served.


JANICE M. HAYES, Esq.
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135
Petitioner

Subscribed and Sworn to before me
this 22nd day of November, 1982


NOTARY PUBLIC



82-956

No. A-264

Office-Supreme Court, U.S. FILED NOV 22 1982 ALEXANDER L. STEVAS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JANICE M. HAYES, *Petitioner,*

v.

VALLEY BANK OF NEVADA, A Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN WHELTON, Individually and as agents or officers of VALLEY BANK; WESTERN STATES BANKCARD ASSOCIATION, A California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE: TRW, INC., an Ohio corporation d/b/a TRW CREDIT DATA, ada TRW INFORMATION SERVICES; STATE OF NEVADA: ELMER GUNDERSON, JOHN MOWBRAY, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their official capacities as Justices of the Supreme Court of Nevada, *Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

RICHARD H. BRYAN
Attorney General of
the State of Nevada

HARRY W. SWAINSTON
Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
Counsel for Respondents

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Aetna Life Ins. Co. v. Haworth</u> , 300 U.S. 227 (1937).	3
<u>Baker v. Carr</u> , 369 U.S. 186 (1962).	3
<u>Boncyk v. Cavanaugh Motors</u> , 657 F.2d 1035 (9th Cir. 1981).	2
<u>Flast v. Cohen</u> , 392 U.S. 83 (1968).	2
<u>Golden v. Zwicker</u> , 394 U.S. 103 (1969).	3
<u>Hayes v. Valley Bank of Nevada</u> , 446 U.S. 902 (1980) rehearing denied, 448 U.S. 908.	4
<u>Helvering V. Gowran</u> , 302 U.S. 238 (1937).	2
<u>James v. Reese</u> , 546 F.2d 325 (9th Cir. 1976).	2
<u>Mansfield, Coldwater & Lake Michigan Ry Co. v. Swan</u> , 111 U.S. 379 (1884).	3
<u>Muskrat v. United States</u> , 219 U.S. 346 (1911).	2
<u>O'Shea v. Littleton</u> , 414 U.S. 488 (1973).	2
<u>Thomas P. Gonzales Corp. v. Consejo Nacional Etc.</u> , 614 F.2d 1247 (9th Cir. 1980).	2

United Public Workers v. Mitchell 2
330 U.S. 75 (1947).

Valley Forge College v. Americans 2, 3
United, Etc., U.S. _____,
102 S. Ct. 752 (1982).

Constitutional Provisions:

Article III of the United States 3
Constitution

Miscellaneous
Nevada Rules of Appellate Procedure 1, 2, 3, 4

No. A-264

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JANICE M. HAYES

Petitioner

vs.

VALLEY BANK OF NEVADA, A Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN WHELTON, Individually and as agents or officers of VALLEY BANK; WESTERN STATES BANKCARD ASSOCIATION, A California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE: TRW, INC., an Ohio corporation d/b/a/ TRW CREDIT DATA, ada TRW INFORMATION SERVICES; STATE OF NEVADA: ELMER GUNDERSON, JOHN MOWBRAY, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their official capacities as Justices of the Supreme Court of Nevada.

Respondents.

REASONS FOR DENYING THE WRIT

The central question raised by the Petitioner in this case concerns the constitutionality of Nevada Rule of Appellate Procedure, Rule 46(b), prior to its 1981 amendment. Based upon a certified copy of the pertinent order of the Nevada Supreme Court dismissing an appeal by Petitioner in a related case before that Court, the Ninth Circuit Court of Appeals ruled that the Petitioner had no standing to challenge the constitutionality of NRAP 46(b)

because it was not applied to her. The Court below fully considered and correctly decided the issue.

The record below clearly indicates that Petitioner has alleged no injury either real or threatened, based upon an application of Rule 46(b) as to her, which would give her standing to maintain the action in the District Court. See e.g. O'Shea v. Littleton, 414 U.S. 488, 493 (1973), Valley Forge College v. Americans United, Etc., _____ U.S. _____, 102 S. Ct. 752 (1982). As the record stands, Petitioner, in short, is simply petitioning this Court for an advisory opinion. Both of the courts below properly declined to assume jurisdiction under these circumstances. See e.g. Flast v. Cohen, 392 U.S. 83, 95 (1968); Golden v. Zwicker, 394 U.S. 103, 108 (1969); United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947); Muskrat v. United States, 219 U.S. 346, 362 (1911).

Although the trial court did not cite Petitioner's lack of standing as a basis for dismissing the action, it is clear that the Ninth Circuit Court of Appeals had the right and duty to affirm on that ground. For, "if the decision below is correct it must be affirmed, although the lower court relied upon the wrong ground or gave a wrong reason." Helvering v. Gowran, 302 U.S. 238, 245, (1937); Boncyk v. Cavanaugh Motors, 657 F.2d 1035, 1041 (9th Cir. 1981); Thomas P. Gonzales Corp. v. Consejo Nacional Etc., 614 F.2d 1247, 1256 (9th Cir. 1980); James V. Reese, 546 F.2d 325, 327 (9th Cir. 1976).

Petitioner complains that the Ninth Circuit Court of Appeals, by its recognition that Petitioner's appeal to the Nevada Supreme Court was not dismissed pursuant to NRAP 46(b),

"provided the appellees with a defense which they had not asserted." (Pet. p. 3, lines 3-4; p. 29, lines 5-7). Petitioner overlooks the fact that a "personal stake" at the time of commencement of the district court action is a jurisdictional requirement which may be raised at any time even by an appellate court on review. See e.g. Baker v. Carr, 369 U.S. 186, 204 (1962); Valley Forge College v. Americans United, Etc., supra, at 760; Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884). The Nevada Rule of Appellate Procedure, Rule 46(b), having never been applied to Petitioner, it could not at the time of commencement of the District Court action been the basis of a case or controversy. The existence of a justiciable case or controversy, of course, is constitutionally required by Article III of the United States Constitution before the Federal District Court may assume jurisdiction. See e.g. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-241 (1937).

Nothing in Petitioner's list of reasons why certiorari should be granted in this case overcomes the jurisdictional defects associated with her challenge to the constitutionality, operation, and effect of NRAP 46(b).

All of those reasons which Petitioner advances for granting of the writ assume that she has standing and that subject matter jurisdiction was extant throughout the lower court proceedings. The Ninth Circuit Court of Appeals properly recognized, however, that this is not the case.

The jurisdictional questions aside, the substantial court imposed policy considerations of repose underlying the doctrines of res judicata and collateral estoppel require that Petitioner's Petition be denied. The Peti-

tioner has previously appealed to this Court for review with respect to the same issue arising from the same state court proceeding which she complains of in the instant Petition. The prior appeal was dismissed by this court for want of a properly presented federal question. Hayes v. Valley Bank of Nevada, 446 U.S. 902 (1980), rehearing denied, 448 U.S. 908. For that reason alone, she should now be precluded on res judicata grounds from again raising this issue.

It follows from the reasons recited herein that the Petitioner cannot raise a substantial federal question regarding NRAP 46(b). Since no other substantial federal questions are posed in the subject Petition, or raised in the courts below, it is clear that the United States District Court below was without jurisdiction to entertain Petitioner's action, unless, perhaps, complete diversity of the parties was present. However, Petitioner conceded on page 1 and 5 of her Opening Brief in the court below, that such diversity was lacking in this case. Accordingly, the Federal District Court had no jurisdiction to entertain the Petitioner's Amended Complaint.

In summary the District Court was correct, even if for the wrong reasons, in dismissing Petitioner's Amended Complaint for want of jurisdiction. It follows that the Ninth Circuit Court of Appeals was correct in affirming the District Court, and that there is no reason for this court to grant certiorari to review the lower court decisions.

CONCLUSION

The petition for a writ of certiorari
should be denied.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By

Harry W. Swainston
Harry W. Swainston
Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada
89710

Telephone: (702)885 - 4170

Counsel for Respondents
State of Nevada and
Justices of the Supreme
Court